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In the Supreme Court of the United States

OCTOBER TERM, 1982

T-1740 TRUSTS, MERCANTILE BANK AND TRUST COMPANY,
LIMITED, TRUSTEE, TRANSFEREE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

	Page
Cases:	
<i>Alexander v. Commissioner</i> , 61 T.C. 278	4
<i>American Steamship Co. v. Wickwire Spencer Steel Co.</i> , 8 F. Supp. 562	4
<i>Berger v. Commissioner</i> , 404 F.2d 668, cert. denied, 395 U.S. 905	6, 7
<i>Boren v. Riddell</i> , 241 F.2d 670	6, 7
<i>City National Bank v. Commissioner</i> , 55 F.2d 1073, cert. denied, 286 U.S. 561	4
<i>Commissioner v. Henry Hess Co.</i> , 210 F.2d 553	5
<i>Commissioner v. Kuckenberg</i> , 309 F.2d 202, cert. denied, 373 U.S. 909	3
<i>Commissioner v. Stern</i> , 357 U.S. 39	4
<i>Commissioner v. Stewart</i> , 186 F.2d 239	6
<i>Gideon-Anderson Co. v. Commissioner</i> , 20 B.T.A. 106	4
<i>Hotel Equities Corp. v. Commissioner</i> , 65 T.C. 528, aff'd, 546 F.2d 725	2, 4
<i>Januschke v. Commissioner</i> , 48 T.C. 496	5
<i>Kentucky Oil Corp. v. Commissioner</i> , 21 B.T.A. 1150	5
<i>Kiley v. Kurtz</i> , 533 F. Supp. 465	6
<i>Lifter v. Commissioner</i> , 59 T.C. 818	7

II

Page

Cases—Continued:

<i>Maher v. Commissioner</i> , 469 F.2d 225	4
<i>Marix, Estate of v. Commissioner</i> , 15 T.C. 819	4
<i>Park & Tilford v. Commissioner</i> , 43 B.T.A. 348	4
<i>Quirk v. Commissioner</i> , 15 T.C. 709, aff'd per curiam, 196 F.2d 1022	5
<i>Reddock v. Commissioner</i> , 72 T.C. 21	6, 7
<i>Rogers v. Commissioner</i> , 57 T.C. 711	7
<i>Sherrod v. Commissioner</i> , 16 B.T.A. 622	5
<i>United States v. Floersch</i> , 276 F.2d 714, cert. denied, 364 U.S. 816	4
<i>Washington Farms, Inc. v. United States</i> , 122 F. Supp. 31	5

Statutes:

Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)):

Section 6212(a) (Supp. V)	5, 6
Section 6213(a) (Supp. V)	3
Section 6501 (& Supp. V)	2, 3
Section 6901	3, 4, 6
Section 6901(a)	4
Section 6901(c)	5
Section 6901(c)(1)	3

Revenue Act of 1926, ch. 27, Section 280,

44 Stat. 61	5
-------------------	---

III

Page

Miscellaneous:

4 B. Bittker, <i>Federal Taxation of Income, Estates and Gifts</i> para. 112.1.6 (1981)	6-7
G.C.M. 1029, VI-1 Cum. Bull. 115 (1927)	5
H.R. Conf. Rep. No. 356, 69th Cong., 1st Sess. (1926)	3
Rev. Rul. 67-406, 1967-2 Cum. Bull. 420	5

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of the decision below in this federal income tax case holding that; (1) the expiration of the three-year period of limitations for assessment of a tax against a taxpayer does not preclude the Commissioner from thereafter assessing the tax against the taxpayer's transferee, as long as he does so within the extended period of limitations applicable to transferees; and (2) that a notice of transferee liability is valid, although sent by ordinary mail rather than by certified or registered mail, where the transferee actually receives the notice in sufficient time to file, and does in fact file, a timely Tax Court petition.

The pertinent facts may be summarized as follows: Petitioner is the transferee of the assets of the Hotel Equities Corporation (Pet. 4). On July 14, 1970, Hotel Equities mailed to the Internal Revenue Service its tax return for its

fiscal year ending January 31, 1970 (Pet. 3). On August 26, 1970, Hotel Equities transferred its assets to petitioner, and dissolved (Pet. 3). On July 17, 1973 — three years and three days after Hotel Equities had mailed its tax return to the Internal Revenue Service — the Commissioner issued a notice of deficiency to Hotel Equities with respect to its taxes for the year ended January 31, 1970, and a notice of transferee liability to petitioner with respect to those same taxes (Pet. 3, 4). Representatives of Hotel Equities then petitioned the Tax Court for a redetermination of the deficiency, and they prevailed on the ground that the Commissioner had issued the notice of deficiency after the expiration of the three-year period of limitations for assessment set forth in Section 6501 of the Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)). *Hotel Equities Corp. v. Commissioner*, 65 T.C. 528 (1975), aff'd, 546 F.2d 725 (7th Cir. 1976).

In the meantime, petitioner had also filed a Tax Court petition (Pet. App. B-2). On October 28, 1977 — several months after the Tax Court's decision in favor of Hotel Equities had become final — petitioner moved for summary judgment on the ground that as a result of the Tax Court's decision in the *Hotel Equities* case, there no longer existed any underlying tax liability for which petitioner, as transferee, could be assessed. Petitioner also asserted that the Tax Court, in any event, lacked jurisdiction, because the notice of transferee liability had been sent by ordinary mail, instead of by certified or registered mail,¹ and thus was invalid (Pet. App. B-3 to B-4).

¹The Commissioner had actually attempted to mail the notice by certified mail (Pet. 4). Since certified mail may not be used for foreign addresses (petitioner is a Bahamian trust), the notice was apparently transmitted by ordinary mail. It was received by petitioner on or about August 21, 1973 (Pet. 5), which was approximately four months before the last date on which petitioner, a Bahamian trust, could file a timely

The Tax Court denied petitioner's motion for summary judgment (Pet. App. B-1 to B-6), and, pursuant to a stipulation waiving further proceedings in the case but reserving to petitioner the right to appeal from the denial of its motion for summary judgment, entered a decision in favor of the Commissioner. The court of appeals affirmed, without opinion (Pet. App. A-1 to A-2).

1. The decision below correctly held that the Tax Court's prior determination that assessment of the tax against Hotel Equities was barred by the expiration of the general three-year statute of limitations provided by 26 U.S.C. (& Supp. V) 6501 did not preclude assessment of the tax against petitioner, as Hotel Equities' transferee. First, the applicable period of limitations here is not provided by Section 6501 (& Supp. V), but rather the extended period set forth in Section 6901(c)(1). That latter provision states that the period of limitations for transferee liability shall be "within 1 year after the expiration of the period of limitation for assessment against the transferor."

Here, it is not disputed that petitioner received its notice of transferee liability (which suspended the running of the period of limitations) well within the extended period of Section 6901. Moreover, it is clear that under Section 6901, assessment of the tax against the taxpayer is not a prerequisite to assessment of the tax against the transferee. See, e.g., *Commissioner v. Kuckenberg*, 309 F.2d 202, 206 (9th Cir. 1962), cert. denied, 373 U.S. 909 (1963); H.R. Conf. Rep. No. 356, 69th Cong., 1st Sess. 44 (1926). It is well settled that the fact that the shorter Section 6501 (& Supp. V)

Tax Court petition (*i.e.*, December 14, 1973), as provided in Section 6213(a) (Supp. V), and approximately 11 months before the scheduled expiration of the period of limitations for assessment of transferee liability (*i.e.*, July 14, 1974), as provided in Section 6901(c)(1). Petitioner filed a timely Tax Court petition on December 14, 1973.

period for making an assessment against a taxpayer has already expired has no effect on the Commissioner's right to proceed within the longer Section 6901 period against the taxpayer's transferee. See *Maher v. Commissioner*, 469 F.2d 225, 230 (8th Cir. 1972); *United States v. Floersch*, 276 F.2d 714, 717 (10th Cir.), cert. denied, 364 U.S. 816 (1960); *City National Bank v. Commissioner*, 55 F.2d 1073 (5th Cir.), cert. denied, 286 U.S. 561 (1932); *American Steamship Co. v. Wickwire Spencer Steel Co.*, 8 F. Supp. 562 (S.D.N.Y. 1934); *Alexander v. Commissioner*, 61 T.C. 278, 298 (1973); *Estate of Marix v. Commissioner*, 15 T.C. 819, 824 (1950); *Park & Tilford v. Commissioner*, 43 B.T.A. 348, 382-383 (1941); *Gideon-Anderson Co. v. Commissioner*, 20 B.T.A. 106 (1930). Accordingly, since the Commissioner in the case at bar proceeded against petitioner within the Section 6901 extended period, the Tax Court's decision in the *Hotel Equities* case had no effect on the Commissioner's right to proceed against petitioner here.

Petitioner contends (Pet. 6-10) that the courts below have improperly used Section 6901 to create a "new liability."² However, it fails to recognize that the liability imposed upon it stems not from Section 6901, but from its status as the transferee of the assets of the Hotel Equities corporation. By virtue of its receipt of those assets, petitioner became liable for Hotel Equities' previously accrued taxes (and other debts) under legal or equitable principles of state law, as contemplated by Section 6901(a). As the Tax Court noted (Pet. App. B-3), this is not a case where, the taxpayer having been found not liable on the merits for the taxes in question, an attempt was made to assert liability for such

²Cf. *Commissioner v. Stern*, 357 U.S. 39, 42 (1958) ("[t]he courts have repeatedly recognized that § 311 [the 1939 Code predecessor of Section 6901] neither creates nor defines a substantive liability but provides merely a new procedure by which the Government may collect taxes").

taxes against the transferee.³ Rather, this case concerns the Commissioner's attempt to collect unpaid taxes from a transferee within the appropriate limitations period, the Commissioner having failed timely to assert liability against the transferor. But as we have noted, assertion of transferee liability is not contingent upon prior timely assertion of liability against the transferor.

2. The decision below also correctly held that the notice of transferee liability sent to petitioner was valid, despite having been sent by ordinary mail, and thus that the Tax Court had jurisdiction over petitioner's case. Section 6212(a) of the 1954 Code (Supp. V)⁴ states that if the

³*Commissioner v. Henry Hess Co.*, 210 F.2d 553 (9th Cir. 1954); *Sherrod v. Commissioner*, 16 B.T.A. 622 (1929); *Kentucky Oil Corp. v. Commissioner*, 21 B.T.A. 1150 (1931), and *Januschke v. Commissioner*, 48 T.C. 496 (1967), upon which petitioner relies (Pet. 9), are therefore inapposite.

Petitioner also invokes (Pet. 10) *Washington Farms, Inc. v. United States*, 122 F. Supp. 31 (M.D. Ga. 1954); *Quirk v. Commissioner*, 15 T.C. 709 (1950), *aff'd per curiam*, 196 F.2d 1022 (5th Cir. 1952); and G.C.M. 1029, VI-1 Cum. Bull. 115 (1927). Those authorities are likewise distinguishable. *Washington Farms* dealt with the expiration of the three-year period of limitations applicable to a taxpayer, not the extended period applicable to a transferee. *Quirk* involved the question of the liability of a transferee whose transferor (unlike *Hotel Equities*) had paid the tax. Finally, the cited ruling (declared obsolete in Rev. Rul. 67-406, 1967-2 Cum. Bull. 420) involved the wholly different question of the retroactive application of the extended period of limitations applicable to transferee liability in Section 280 of the Revenue Act of 1926, ch. 27, 44 Stat. 61, the predecessor provision to Section 6901 of the 1954 Code.

⁴Although Section 6212(a) (Supp. V), on its face deals with notices of deficiency rather than notices of transferee liability, it is the applicable provision here because Section 6901, the transferee liability provision, provides in subsection (a) that transferee liability is to be assessed in the same manner and subject to the same provisions and limitations (plus the extended period provided by Section 6901(c) of the 1954 Code) as the underlying deficiency with respect to which the transferee liability was incurred.

Commissioner determines that an income tax deficiency exists, he is "authorized" to send a notice of such deficiency "by certified mail or registered mail." In "authorizing" these two methods of mailing, however, it is apparent that Section 6212(a) (Supp. V) does not forbid use of any other method, such as hand delivery or ordinary mail. See *Berger v. Commissioner*, 404 F.2d 668, 673 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969); *Reddock v. Commissioner*, 72 T.C. 21, 25 (1979). Moreover, as the Tax Court noted (Pet. App. B-5), the purposes behind the requirement that the Commissioner issue a notice of deficiency are to inform the taxpayer that a deficiency has been determined, and to provide him with an opportunity to petition the Tax Court for a redetermination thereof. Accordingly, where a taxpayer receives actual notice of the deficiency and, at the time of such notice, has ample time remaining in which to file a Tax Court petition, the purposes of the statute are met, and the notice of deficiency is therefore valid. *Berger v. Commissioner, supra*; *Boren v. Riddell*, 241 F.2d 670 (9th Cir. 1957); *Commissioner v. Stewart*, 186 F.2d 239 (6th Cir. 1951); *Kiley v. Kurtz*, 533 F. Supp. 465 (D. Colo. 1982).

Here, the notice of transferee liability was received by petitioner at a time when it had almost four months remaining in its 150-day period for filing a timely Tax Court petition, and petitioner did in fact file such a timely petition. Accordingly, the purposes behind the notice of deficiency (or notice of transferee liability) requirement were served, and the notice here was valid. Consequently, the Tax Court's assumption of jurisdiction was proper.⁵

⁵Petitioner (Pet. 12, 15-16) principally relies on pre-1950 Tax Court and Board of Tax Appeals cases to support its contention that a notice of deficiency not sent by registered (or certified) mail cannot be valid even if it is actually received in a timely manner. These cases, which have been criticized as "curiously wooden" in 4 B. Bittker, *Federal Taxation*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1983

of Income, Estates and Gifts para. 112.1.6 (1981), appear no longer to reflect the views of the Tax Court, in view of that court's approving citations of *Boren v. Riddell, supra*, and *Berger v. Commissioner, supra*, in *Lifter v. Commissioner*, 59 T.C. 818, 820, 823 (1973), and *Reddock v. Commissioner*, 72 T.C. 21, 25, 27 (1979).

Rogers v. Commissioner, 57 T.C. 711 (1972), cited by petitioner (Pet. 12) is distinguishable. There, the taxpayers did not receive actual notice of the deficiency until after the period of limitations for assessment had expired. Here, on the other hand, petitioner received the notice of transferee liability with approximately 11 months remaining in the four-year period of limitations for assessment of transferee liability. See generally *Reddock v. Commissioner, supra*, 72 T.C. at 25-27.